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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-268

IRVING POLCOVER, *Petitioner*

v.

SECRETARY OF THE TREASURY, COMMISSIONER OF INTERNAL REVENUE, CHAIRMAN AND COMMISSIONERS, UNITED STATES CIVIL SERVICE COMMISSION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdictional Statement	2
Questions Presented For Review	2
Constitution And Statutory Provisions Involved In This Case	4
Statement Of The Case	4
Argument	8
I. The Court of Appeals Completely Ignored The Fact That The Government Made No Effort Whatsoever To Carry The Burden Of Proof In The Removal Proceeding Wherein Petitioner Was Charged With A Serious Crime. Indeed, Under The IRS Regulations, Petitioner Was Compelled To Try To Prove His Innocence In Violation Of The Fifth And Sixth Amendments	8
II. The Fifth And Sixth Amendments Require The Government, When It Simultaneously Discharges And Indicts A Federal Civil Service Employee On The Basis Of The Same Serious Criminal Charge, To Establish That Charge Beyond A Reasonable Doubt In Both The Federal Criminal Proceeding And The Federal Removal Proceeding, Particularly Since That Rule Is Already Universally Applied In Private Industry Discharge Cases. In The Instant Case, Application Of That Rule Is Also Especially Compelling Where Petitioner Was Unanimously Acquitted Of The Criminal Charge In The Federal Criminal Proceeding And The Government Thereafter Elected To Base the Federal Discharge Proceeding Exclusively On The Transcript Of That Criminal Trial	10
III. The Fifth And Sixth Amendments Required The Government In The Federal Removal Proceeding Here Involved To Confront Petitioner With The Witnesses Against Him And To Permit Petitioner To Cross-Examine Those Witnesses, Especially When His Counsel Demanded That Right	14

Page

IV. Petitioner's Rights Under The Fifth Amendment Were Violated From The Very Outset When He Was Summarily Suspended And Removed From His Position In 1964 Without A Prior Hearing .. 16

V. Petitioner's Suspension And Removal From The Federal Service Were Null And Void Under The Veterans' Preference Act 17

VI. Courts In The Federal System Possess The Power To Set Aside Federal Employee Suspensions And Removals Accomplished In Violation Of The Constitution Or Applicable Laws And Regulations And To Decide Whether Same Are Supported By The Appropriate Quantum Of Evidence In Specific Cases 21

Conclusion 22

TABLE OF CITATIONS

CASES CITED:

Connelly v. *Nitze*, D.C. Cir. 1968, 401 F.2d 416 .....10, 17
Finfer v. *Caplin*, 344 F.2d 38 (1965), cert. denied, 382 U.S. 883 (1965) 11, 12
Fruehauf Trailer Co. v. *International Association of Machinists*, 21 LA 832 (1954) 12, 13
General Refractories Co. v. *United Brick & Clay Workers*, 24 LA 470 .....12, 13
Goldberg v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970) 9, 15, 16
Greene v. *McElroy*, 360 U.S. 474 (1959) 12, 15
Kennedy v. *Sanchez*, D.C.N.D. Ill., 1972, 349 F. Supp. 863, appeal pending 9, 16
Mallow v. *United States*, 161 Ct.Cl. 207 (1963) 18
Massman v. *Secretary of Housing & Urban Development*, D.C.D.C. 1971, 332 F. Supp. 894 21
Meehan v. *Macy*, D.C. Cir. 1968, 392 F.2d 822 21
Morrissey v. *Brewer*, 92 S.Ct. 2593 (1972) 9, 16
Patterson v. *United States*, Ct.Cl. 1963, 319 F.2d 882 18, 19, 20
Pelicone v. *Hodges*, CCA, D.C. 1963, 320 F.2d 754 10
Peters v. *Hobby*, 349 U.S. 331, 344-345 (1955) 12
Powell v. *Zuckert*, D.C. Cir., 1966, 366 F.2d 634 17

Page

Ricucci v. *United States*, Ct.Cl. 1970, 425 F.2d 1252 ..19, 20
Service v. *Dulles*, 354 U.S. 363 .....17, 20
Turney v. *United States*, 168 Ct.Cl. 207 18
United States Steel Corp. v. *United Steelworkers of America*, 29 LA 272 (1951) 12, 13
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 17, 20
Washington v. *United States*, 147 F. Supp. 284, 137 Ct.Cl. 344, cert. dism. 355 U.S. 801 18
Weinberg v. *Macy*, 124 U.S. App. D.C. 1, 360 F.2d 816 (1916) 9, 10
Williams v. *Zuckert*, 371 U.S. 531 12
Willner v. *Committee on Character & Fitness*, 373 U.S. 96, 83 S.Ct. 1175 (1963) 9
Wittner v. *United States*, 76 F. Supp. 110, 110 Ct.Cl. 231 18

STATUTES:

Administrative Procedure Act (5 U.S.C. § 556(d) 10
Veterans' Preference Act (5 U.S.C. § 7512) 3, 4, 7, 17, 18, 19, 20, 22

REGULATIONS:

Civil Service Commission Regulations, 5 C.F.R. § 752.202(b) 19

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Irving Polcover of the State of New York hereby respectfully petitions the Supreme Court of the United States to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 4, 1973, and the said Court's denial, on May 11, 1973, of petitioner's petitions for rehearing and reconsideration by the original panel of the Court of Appeals and by the Court of Appeals *en banc*.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. No opinion was rendered by the United States District Court for the District of Columbia, which granted the Government's motion for summary judgment and dismissed petitioner's complaint for reinstatement to the federal position he held for 18 years, without any hearing and without even scheduling oral argument.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Court of Appeals were rendered on April 4, 1973. Petitioner's petitions for rehearing and for reconsideration *en banc* were denied on May 11, 1973. Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by Title 28 U.S.C. § 1254(1), this petition having been filed within ninety days after the Court of Appeals denied petitioner's applications for rehearing and rehearing *en banc* on May 11, 1973, in the manner prescribed by Title 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

This petition presents for review the following questions of vital importance not only to petitioner, a federal employee who was summarily removed from his position with the Internal Revenue Service after 18 years of excellent service to the United States, but to federal employees generally:

> (1) Whether the Fifth and Sixth Amendments require the Government to carry the burden of proof in a federal removal proceeding wherein it is proposed to discharge a federal civil service employee on the basis of a serious criminal charge?

(2) Whether the Fifth and Sixth Amendments require the Government, which simultaneously discharges and indicts a federal civil service employee on the basis of the *same serious criminal charge,* to establish that charge *beyond a reasonable doubt* in *both* the federal criminal proceeding and the federal removal proceeding, particularly in a case where the employee is *unanimously acquitted* of that charge in the federal criminal proceeding and the Government thereafter elects to base the federal discharge exclusively on the transcript of that criminal trial?

(3) Whether the Fifth and Sixth Amendments require the Government in a federal removal proceeding to prove a serious criminal charge (such as alleged bribery) against a federal civil service employee *beyond a reasonable* doubt in light of the fact that arbitration tribunals regularly require that quantum of proof in private industry discharge cases based on even less serious criminal charges?

(4) Whether the Fifth and Sixth Amendments require the Government in a federal removal proceeding to confront a federal civil service employee with the witness who charged that employee with the acceptance of an alleged bribe, especially in a case where the employee, previously acquitted of the bribery charge in a federal court, demands the right to confront and cross-examine that witness?

(5) Whether petitioner's rights under the Veterans' Preference Act (Title 5 U.S.C. 7512(b)(2)) were seriously violated in this case when he was prevented from personally answering the alleged

bribery charge against him to an official of the Internal Revenue Service possessed of authority either to make a final decision on the proposed removal action or to recommend what decision should be made?

(6) Whether courts in the federal system have the absolute power to review federal employee removal actions to determine whether they violate the Constitution, federal statutes and regulations and whether they are supported by the necessary quantum of evidence in specific cases?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Fifth and Sixth Amendments to the Constitution of the United States and the Veterans' Preference Act and regulations thereunder. Pursuant to the provisions of Rule 23(d) of this Court's rules, the text of said provisions, as here applicable, is set forth in the Appendix to this petition.

STATEMENT OF THE CASE

This case presents a truly distressing *constitutional* picture. Petitioner, a Veterans' Preference Act federal civil service employee with more than 18 years of honorable service to the United States Government, was summarily discharged in 1964 as an Internal Revenue Agent in New York City and thereafter *indicted* by a federal grand jury on the basis of the *very same criminal charge*—to wit, that he allegedly accepted a bribe from a New York accountant in connection with the audit of a 1959 federal income tax return (J.A. 24-27, 29). Petitioner steadfastly maintained his innocence, and after long delays attributable solely to the Govern-

ment, he was finally tried by a judge and jury in the United States District Court in New York (J.A. 29). At that trial, the Government presented its entire case against petitioner, and the New York accountant named in the bribery charge was examined and cross-examined (J.A. 30-33). The jury thereafter unanimously returned a verdict of acquittal (J.A. 33).

Petitioner, by then separated from his position and means of livelihood for almost three years because the Internal Revenue Service simply refused to process his administrative appeal until the criminal case involving the *same bribery charge* was concluded, immediately applied for reinstatement (J.A. 33, 34). His application was denied (J.A. 34). Rather, the Internal Revenue Service scheduled a "hearing" on his appeal at which (1) petitioner reiterated his plea of innocence, and (2) *the Government elected to rely exclusively on the transcript of the criminal case which led, as aforesaid, to petitioner's acquittal in the District Court* (J.A. 35-37). When petitioner's counsel thereupon insisted that the Government produce the New York accountant for *live cross-examination* before the IRS Hearing Officer —a procedure the Government had followed in other job appeal cases involving the said accountant's bribery charges against *other IRS agents*—the Government refused to produce him, and the Hearing Officer refused to order his production (J.A. 35, 36).

Shortly thereafter, however, that same Hearing Officer capriciously rendered a decision wherein he stated the *sole* "Issue Considered" by him was whether the New York accountant was truthful when he maintained he bribed the petitioner (J.A. 38). Then, *without ever seeing the New York accountant and without hearing any testimony from and cross-examination of the*

said accountant and thus exclusively on the strength of his own reading of the cold transcript of the criminal trial in which petitioner had been unanimously acquitted of the said bribery charge, the IRS Hearing Officer went on to conclude that the New York Accountant should be deemed *truthful* and that accordingly, petitioner's removal from the federal service should be *perpetuated* (J.A. 38). The Civil Service Commission concurred, so petitioner filed the instant action.

In the District Court, the Government procrastinated for months in the filing of its Answer. Finally, the parties cross-moved for summary judgment, and petitioner's counsel requested oral argument. Additional months went by. Suddenly, on October 6, 1971, the District Court entered a very brief order denying petitioner's motion, granting the Government's cross-motion and dismissing the complaint (J.A. 51). The District Court gave no reasons for its action and it produced no findings of fact or conclusions of law to support its order. Petitioner appealed.

The Court of Appeals, obviously bothered by the manner in which the District Court handled this case, became preoccupied in its opinion with the complete inadequacy of current judicial review procedures in federal employee job reinstatement cases, and finally concluded that the entire problem should be considered by the Judicial Review Committee of the Administrative Conference of the United States (*Slip Opinion,* pgs. 2-8). Then, apparently convinced *(erroneously, we believe)* that its own jurisdiction under current review procedures was exceedingly limited and narrow, the Court of Appeals proceeded to rule:

> (1) That although a federal court would almost certainly view the evidence in this case differently

than did the IRS Hearing Officer and the Civil Service Commission, courts are powerless to alter those agency conclusions when same might be construed as supported by *"substantial evidence"* (*Slip Opinion,* pg. 14);

(2) That although the Constitution clearly requires *"proof beyond a reasonable doubt"* to establish the criminal charge of bribery in a *federal judicial proceeding,* that *same criminal charge* need only be supported by *"substantial evidence"* or a *"preponderance of the evidence"* in a *federal removal proceeding* (*Slip Opinion,* pgs. 14, 15);

(3) That accordingly, petitioner's rights under the Fifth and Sixth Amendments were not violated when the Government found him *guilty* in the federal removal proceeding of the *same criminal charge of bribery* of which he had been *totally acquitted* in the prior federal judicial proceeding—the Government's finding of guilt being based solely on the transcript of proceedings which led to petitioner's *unanimous acquittal* in the federal judicial proceeding (*Slip Opinion,* pgs. 14, 15);

(4) That IRS' refusal to produce the New York accountant for live cross-examination in the federal removal proceeding did not violate petitioner's constitutional rights since petitioner had already enjoyed "extensive cross-examination" of the accountant in the federal judicial proceeding which led to petitioner's acquittal (*Slip Opinion,* pgs. 17, 18);

(5) That although petitioner's rights under the Veterans' Preference Act and the implementing regulations were apparently violated during the

initial IRS removal proceedings in 1964, those violations should be ignored because *"Litigation must end somewhere,"* and it would be burdensome to remand this case to the Civil Service Commission with instructions to hold further hearings at this time (*Slip Opinion*, pgs. 19-26).

ARGUMENT

I.

The Court Of Appeals Completely Ignored The Fact That The Government Made No Effort Whatsoever To Carry The Burden Of Proof In The Removal Proceeding Wherein Petitioner Was Charged With A Serious Crime. Indeed, Under The IRS Regulations, Petitioner Was Compelled To Try To Prove His Innocence In Violation Of The Fifth And Sixth Amendments.

Petitioner was summarily removed from his position with the Internal Revenue Service in late 1964 (J.A. 24-28). Petitioner appealed to the Regional Commissioner of Internal Revenue, but the Commissioner refused to process his appeal until the criminal proceedings involving the identical bribery charge against petitioner were concluded (J.A. 28). Fourteen months later, petitioner was finally indicted on that charge, and approximately three years after his original discharge from the federal service, he was brought to trial and ultimately acquitted (J.A. 29-33). Petitioner thereupon applied for reinstatement to his position (J. A. 33, 34), but was advised a "hearing" was necessary (J.A. 34).

At the outset of the "hearing" before an IRS Hearing Officer, petitioner was advised by a reading from the *Treasury Department's Guide for Conduct of Hearings on Employee Appeals* that the sole purpose of the "hearing" was to give the "employee a chance

to present evidence" to support his plea of innocence to the criminal charge underlying his removal from the service (J.A. 34). The Government made no effort to prove the said criminal charge. In fact, it presented no witensses (J.A. 37).

Petitioner thereupon produced the transcript of the criminal trial in which he had been acquitted of the identical bribery charge, but counsel for IRS objected "to the introduction of anything relating to the criminal case on the ground that the criminal proceedings are irrelevant to the matter at hand here" (J.A. 35). In any event, the said transcript was accepted by the Hearing Officer (J.A. 35).

These arbitrary procedures, which soon resulted in federal rulings banning petitioner from the federal service and branding him with a bribery stigma for life, *plainly violated the due process of law provisions of the Fifth Amendment and they deprived petitioner of the Sixth Amendment right to be confronted with the witnesses against him in a federal job removal prosecution based on a serious crimianl charge* (*Morrissey* v. *Brewer,* 92 S.Ct. 2593 (1972); *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970); *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 83 S. Ct. 1175 (1963); *Kennedy* v. *Sanchez,* D.C.N.D. Ill., E.D., 349 F. Supp. 863 (1972), app. pending).

Clearly, therefore, the burden of proof—the burden of going forward—was upon the Government in a federal employee removal proceeding (*Weinberg* v. *Macy,* 124 U.S. App. D.C. 1, 360 F.2d 816 (1966)), and when the Government, pursuant to its own IRS regulations, flatly refused even to try to carry the burden of proof

and thus shifted the burden to petitioner from the very outset, petitioner's discharge, based on such procedures, was a nullity (*Weinberg* v. *Macy, supra; Pelicone* v. *Hodges,* CCA, D.C. 1963, 320 F.2d 754; *Connelly* v. *Nitze,* CCA D.C. 1968, 401 F.2d 416). In fact, the Administrative Procedure Act states the rule in simple terms as follows, at Title 5 U.S.C. § 556(d);

> ". . . the proponent of a rule or order has the burden of proof."

The Court of Appeals clearly erred from the outset, therefore, when it completely ignored this extremely important threshhold issue in its decision of April 4, 1973 in the case at bar.

The Fifth And Sixth Amendments Require The Government, When It Simultaneously Discharges And Indicts A Federal Civil Service Employee On The Basis Of The Same Serious Criminal Charge, To Establish That Charge Beyond A Reasonable Doubt In Both The Federal Criminal Proceeding And The Federal Removal Proceeding, Particularly Since That Rule Is Already Universally Applied In Private Industry Discharge Cases. In The Instant Case, Application Of That Rule Is Also Especially Compelling Where Petitioner Was Unanimously Acquitted Of The Criminal Charge In The Federal Criminal Proceeding And The Government Thereafter Elected To Base The Federal Discharge Proceeding Exclusively On The Transcript Of That Criminal Trial.

In 1964, petitioner was removed from his federal position on the ground that he allegedly accepted a bribe to influence an audit of a 1959 tax return. Petitioner was thereafter indicted on that same charge; he was brought to trial and acquitted by a federal District Court in New York. The Government, which had held petitioner's appeal from the federal discharge action in abeyance awaiting the outcome of the criminal case, thereupon ruled, *on the basis of the transcript of that*

criminal trial, that petitioner was nevertheless still guilty, in its opinion, of the birbery charge of which he had already been acquitted. Accordingly, the Government, which was totally unable to prove the bribery charge in a court of law and which made no effort to carry the burden of proof in the IRS discharge proceedings, succeeded in its vendetta against petitioner by banning him from the federal service and by saddling him for life with the stigma of bribery.

The Court of Appeals, relying on the Second Circuit's decision in *Finfer* v. *Caplin,* 344 F.2d 38 (1965), cert. denied 382 U.S. 883 (1965, sustained this utterly capricious, outrageous result by holding (*Slip Opinion,* pgs. 14, 15):

> "The difference between proof to a *'preponderance' of the evidence,* the burden assumed by the agency in administrative proceedings of this nature, and proof *'beyond reasoanble doubt,'* the burden assumed *by the government in criminal prosecutions,* is critical."

But, in cases of this kind, where the removal proceeding and the criminal case are *both* based on the same *criminal charge,* it is perfectly clear that the Government is actually concomitantly engaged in two *"criminal prosecutions."* In the court proceeding, the *punishment* sought for the alleged criminal offense is fine or imprisonment. In the removal proceeding, the *punishment* sought for that *same alleged criminal offense* is at least equally severe—to wit, removal from the federal service after 18 years of past employment, deprivation of salary and the ability fairly to earn a livelihood through other employment, and fixation of a lifelong badge of infamy, e.g., the ugly stain of bribery. *Patently, therefore, the Government's burden of proof*

in the latter prosecution for bribery should not be any lighter than its burden in the former—in both cases, due process of law and simple justice demand that the Government establish the bribery charge beyond a reasonable doubt.

In many instances this Court has analogized federal removal proceedings that cast discharged federal employees into outer darkness to proceedings that really *"involve the imposition of criminal sanctions," and thus this Court has often turned to 'deeply rooted' principles of criminal law for guidance in dealing with such cases (See Peters* v. *Hobby,* 349 U.S. 331, 344-345 (1955); *Greene* v. *McElroy,* 360 U.S. 474, 496-497 (1959); *Williams* v. *Zuckert,* 371 U.S. 531, 533-536 (1963, dissenting opinion)). Plainly, this case demonstrates why it thus imperative for this Court to apply such principles in this area of the law and thus reject the Second Circuit's reasoning in *Finfer* v. *Caplin, supra,* by *holding that when a federal removal action is based on a serious criminal charge, due process requires the Government to establish that criminal charge by the same quantum of proof required constitutionally to establish that same charge in a federal criminal action—namely, by proof beyond a reasonable doubt.*

Such action by this Court in federal removal cases is made even more urgent and compelling by the fact that arbitration tribunals in *private industry discharge cases* have already led the way and applied that same rule as a matter of *"inherent basic justice"* for years (See *United States Steel Corp.* v. *United Steelworkers of America,* 29 LA 272, 276-277 (1957); *General Refractories Co.* v. *United Brick & Clay Workers of America,* 24 LA 470, 481 (1955); *Fruehauf Trailer*

Co. v. *International Association of Machinists,* 21 LA 832 (1954)). In *United States Steel, supra,* the rule was stated as follows, at page 277:

> "The most logical approach would seem to be to hold that, with referene to an offence of the *non-criminal type* (such as violation of rules), a preponderance of the credible evidence will suffice, *whereas the commission of an offence of the criminal type should be proved beyond a reasonable doubt,* in view of the different social effects upon, and the sigma attaching to, the employee whose commission of the offense is duly established . . ." (Italics supplied.)

In *General Refractories,* the rule to be applied in cases involving private industry employers and employees was described in these terms, at page 481:

> "Whenever, therefore, the Company suspends an employee on suspicion that he has committed an offense, the Company necessarily suspends him at its own risk. And the degree of risk which the Company assumes is greater if it suspends an employee on suspicion that he has committed a criminal offense, such as stealing, than if his suspension is based on suspicion of commission of a non-criminal offense, such as insubordination, or smoking in a prohibted area. To sustain a suspension on either of these two types of grounds, the Company is required to prove that the employee is guilty of the offense of which he is suspected, *but the degree of proof requisite to establish guilt of a criminal offense is substantially greater than that required to establish guilt of a non-criminal offense.* The degree of proof required for the latter is measured by the standard known as the 'preponderance of the evidence'. . . . *But to sustain a suspension based on suspicion that an employee has committed a criminal offense, the*

> *evidence must prove the employee guilty 'beyond a reasonable doubt,'* that is to say, the evidence must be such that reasonable persons looking at it would be so sure of the fact of the offense that they would have no hesitancy of finding the employee guilty of the act. *The reason for this distinction is that the social effects upon and the stigma attaching to an employee found guilty of a criminal offense are far greater than those attaching to an employee found guilty of a non-criminal offense. . . .*" (Italics supplied.)

Certainly, the rule in federal removal cases, *where the federal employees involved are protected by the Fifth and Sixth Amendments against unfair, arbitrary capricious Government action,* should not be different than the rule historically followed by private industry, where basic constitutional guaranties are not supposed to be so readily available and applicable. Moreover, that rule should surely apply in the case at bar, where the federal employee involved was unanimously acquitted of the crime of bribery, only thereafter to be "convicted" by arbitrary, capricious IRS superiors on the strength of the very same record which led the District Court to his acquittal.

III.

The Fifth And Sixth Amendments Required The Government In The Federal Removal Proceeding Here Involved To Confront Petitioner With The Witnesses Against Him And To Permit Petitioner To Cross-Examine Those Witnesses, Especially When His Counsel Demanded That Right.

As stated above, the Government refused to produce the New York accountant, who allegedly bribed petitioner, as a witness in the federal removal proceeding, and it denied petitioner's counsel the right to cross-

examine that person. The Court of Appeals sustained the Government's recalcitrance, stating that petitioner's counsel had already cross-examined the accountant at the criminal trial which led to petitioner's acquittal of the bribery charge, and hence "no due process violation occurred" when cross-examination was denied in the later, separate removal proceeding before the Internal Revenue Service. Certainly, litigations in the federal system cannot possibly become so treacherous and diabolical that a unanimous judgment of acquittal in a federal criminal case is to be totally ignored in a subsequent agency removal proceeding based on the same criminal charge, while simultaneously steps the federal employee took to defend himself in that criminal action preclude him of the same constitutional rights and defenses in the ageny removal case!

In any event, this Court recently ruled in *Goldberg* v. *Kelly,* 397 U.S. 254, 269, 270, 90 S.Ct. 1011, 1021 (1970):

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

Please see also: *Greene* v. *McElroy,* 360 U.S. 474, 496, 497, 79 S.Ct. 1400, 1413 (1959).

Ergo, the Court of Appeals erred grievously when it sustained the Government's complete denial of petitioner's constitutional right to confront and cross-examine the adverse witness in the case at bar.

IV.

Petitioner's Rights Under The Fifth Amendment Were Violated From The Very Outset When He Was Summarily Suspended And Removed From His Position In 1964 Without A Prior Hearing.

In Points I through III, *supra,* we have sought to demonstrate how petitioner's rights under the Fifth and Sixth Amendments were violated in 1967 and 1968 when, *after* his acquittal in the criminal proceeding, the Government nevertheless arbitrarily and capriciously found him guilty in the federal removal proceeding on the basis of the record in the crimianl trial.

In truth and in fact, however, petitioner's rights under the Fifth Amendment were actually violated from the very outset *in 1964* when the Government summarily separated him from his position as an Internal Revenue Agent without a *prior hearing* of any kind (*Kenendy* v. *Sanchez,* U.S.D.C., N.D. Ill., E.D. 1972, 349 F. Supp. 863, appeal pending; *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970); *Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593 (1972)). In *Kennedy* v. *Sanchez,* the three-judge district court in Illinois stated, at page 865:

> "Accordingly, we hold 5 U.S.C. § 7501 and related regulations to be unconstitutional insofar as they authorize the removal or suspension without pay of federal employees in the competitive service without a prior hearing in which the minimal procedural requirements outlined above are observed."

V.

Petitioner's Suspension And Removal From The Federal Service Were Null And Void Under The Veterans' Preference Act.

The Court of Appeals actually found that petitioner's suspension and removal from the federal service were accomplished in violation of the Veterans' Preference Act (Title 5 U.S.C. § 7512 (b)(2)(1970)), but the Court decided not to reinstate petitioner to his position or to remand the case to the Civil Service Commission solely because it felt *"Litigation must end somewhere,"* and it falsely and erroneously suggested that perhaps petitioner had not squarely raised this procedural issue during the earlier administrative proceedings before IRS and the Commission (See *Slip Opinion,* pgs. 19-26). But the Court of Appeals simultaneously admitted on the face of its opinion (at page 24):

> "Throughout the proceedings, from his first letter to the Regional Commissioner to his final appeal to the Commission, appellant has complained of various procedural deficiencies in his removal."

It is settled, of course, that when a federal employee is suspended or removed from the federal service in violation of federal law or the applicable regulations, that action is a complete nullity (*Vitarelli* v. *Seaton,* 359 U.S. 535, 546, 547 (1959); *Service* v. *Dulles,* 354 U.S. 363; *Powell* v. *Zuckert,* D.C. Cir. 1966, 366 F.2d 634; *Connelly* v. *Nitze,* D.C. Cir. 1968, 401 F.2d 416). The applicable rule was stated by Mr. Justice Frankfurter in his concurring opinion in *Vitarelli* v. *Seaton, supra,* as follows, at 359 U.S. 535, 546, 547:

> "An executive agency must be rigorously held to the standards by which it professes its actions

> to be judged . . . Accordingly, if dismissal from employment is based on a defined procedure, . . . *that procedure must be scrupulously observed* . . . He that takes the procedural sword shall perish with that sword."

It is equally well settled under the Veterans' Preference Act (Title 5 U.S.C. § 7512(b)(2)) that a Veterans' Preference federal civil service employee may *not* be suspended or removed from this position without first being afforded the opportunity *personally* to confer with the official who proposes to suspend or remove him, and if he is removed in violation of this right, the suspension or removal thus obtained is *null, void and unlawful* (*Washington* v. *United States,* Ct. Cl. 1957, 147 F. Supp. 284, 137 Ct.Cl. 344, cert. dismissed 355 U.S. 801; *Patterson* v. *United States,* Ct.Cl. 1963, 319 F.2d 882; *Turney* v. *United States,* 168 Ct. Cl. 77; *Mallow* v. *United States,* Ct. Cl. 1963, 161 Ct. Cl. 207; *Wittner* v. *United States,* 76 F. Supp. 110, 110 Ct.Cl. 231). In *Washington, supra,* the Court of Claims stated, at page 288:

> "The procedural rights of a veteran under Section 14 are clear and simple. In the present case, one of those rights was denied. The plaintiff was denied his right to answer the charges against him in person at the agency level. The fact that he was subsequently given a de novo hearing at a higher level does not cure the procedural defect. Since the *agency did not follow the procedure laid down by Congress, plaintiff's discharge was unlawful.*"
>
> (Italics added.)

In the case at bar, the Court of Appeals found that petitioner had been denied the right to confer *personally* with the District Director who proposed to sus-

pend and remove him, but was instead "relegated to an Oral Reply Officer"—an intermediary who conceded on the record that he was without authority to decide whether or not the proposed suspension or removal should proceed or be terminated. In this regard, the applicable Civil Service regulations state (5 C.F.R. § 752.202(b)):

> "When the employee requests an opportunity to answer personally, the agency shall make a representative or representatives available to hear his answer. *The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.*" (Italics added.)

Indeed, the Court of Claims has specifically ruled in *Ricucci* v. *United States,* 425 F.2d 1252 (Ct.Cl. 1970), *motion for reconsideration denied,* 432 F.2d 453 (Ct.Cl. 1970), a case involving the proposed removal of an employee by the Internal Revenue Service, that when a Veterans' Preference IRS employee is relegated to an oral reply officer under the Veterans' Preference Act, the procedure is unlawful *unless IRS is able to prove that the oral reply officer actually possessed the power to make a final decision on the proposed adverse action or that he had both the power to make, and actually did make, a recommendation regarding what the final decision should be.* Please see also *Patterson* v. *United States, supra.*

It is truly unbelievable, therefore, that the Court of Appeals in the case at bar would suddenly engage in pure semantics and illogical, hyper-technical reasoning to deprive the very unfortunate petitioner in

this case of his basic rights under the Veterans' Preference Act. In fact, the Court of Appeals' opinion actually runs absolutely contrary to this Court's decisions in *Vitarelli* v. *Seaton* and *Service* v. *Dulles, supra,* in that it seeks to shift the burden of proof on the issue of the Government's *"procedural propriety"* in the removal proceeding from the Government, which "took the procedural sword" in the first place, to petitioner. Plainly, it is the Government's obligation to operate properly under the Veterans' Preference Act, and it is the Government's duty to be able to support its procedures under that statute when they are challenged in federal litigations. How could petitioner possibly be expected to know what an IRS Oral Reply Officer actually did with petitioner's oral reply to a proposed removal action when petitioner had already been summarily banned from the office? In fact, what relevance does that question have in light of the concession on the record in this case that the Oral Reply Officer is not empowered to either make a decision or a decisive recommendation on proposed suspensions or removals, and in light of the Court of Claims' ruling in *Ricucci?*

Clearly, it is vitally important not only to Petitioner but to employees throughout the federal service, for this Court to settle this crucial issue under the Veterans' Preference Act by reversing the Court of Appeals' erroneous ruling in this case and by reinstating and reinforcing the earlier, correct rulings of the Court of Claims in *Washington, Patterson,* and *Ricucci, supra.*

VI.

Courts In The Federal System Possess The Power To Set Aside Federal Employee Suspensions And Removals Accomplished In Violation Of The Constitution Or Applicable Laws And Regulations And To Decide Whether Same Are Supported By The Appropriate Quantum Of Evidence In Specific Cases.

Obviously, the Court of Appeals was surprised at and disturbed by the unfortunate delays and unexplained summary actions taken by the District Court in this case. It is thus understandable that the Court should take the opportunity thus presented to criticize the present state of the judicial review processes in federal employee removal actions. However, it is equally apparent that the Court of Appeals went entirely too far in its conclusions regarding the jurisdiction and power held by federal courts in this area of the law.

For a long time, this Court and others in the federal system have ruled that, in federal employee removal cases, federal courts possess both the jurisdiction and power to set aside any removal accomplished in violation of the Constitution, the statutes, or the applicable regulations and those which are not supported by the appropriate quantum of evidence (*Vitarelli* v. *Seaton, supra; Service* v. *Dulles, supra; Connelly* v. *Nitze, supra; Pelicone* v. *Hodges, supra; Powell* v. *Zuckert, supra; Meehan* v. *Macy,* D.C. Cir. 1968, 392 F.2d 822; *Massman* v. *Secretary of Housing & Urban Development,* D.C.D.C. 1971, 332 F. Supp. 894).

Thus, the Court of Appeals was wrong in its conclusion that federal courts have such limited and narrow jurisdiction and powers in cases of this kind that a remedy cannot be provided even when it is clear that a remedy is necessary to prevent a miscarriage of justice.

Certainly, the Court of Appeals had the power in this case to determine whether petitioner's rights under the Fifth and Sixth Amendments or under the Veterans' Preference Act and regulations had been violated. And, patently the Court of Appeals had the power to decide what different measures of proof should be required in (1) a federal removal case based on a serious criminal charge, and (2) a federal removal action based on other non-criminal charges. Finally, there is no rule of law or other jurisdictional restriction which prevents the granting of relief when the Court actually concludes that a federal employee was removed from his position in violation of the Veterans' Preference law—an Act of the Congress.

It thus seems crucially important for this Court to grant certiorari in this case, not only for the reasons expressed in Points I-V of this petition, but also for the purpose of clarifying the correct jurisdictional rights and powers possessed by federal courts in federal removal actions. This clarification should include a new, authoritative statement of the different measures of evidence required to sustain federal removal actions based on criminal and non-criminal charges, and directions regarding the Government's burden of proof in removal cases of a criminal nature.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted:

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